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NO. 88-902

In the
Supreme Court of the United States
OCTOBER TERM, 1988

JOHN A. BERSANI, NEWPORT GALLERIA GROUP, ROBERT J. CONGEL AND THE PYRAMID COMPANIES,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, *et al.*,
Respondents.

AND

No. 88-929

JOSEPH ROBICHAUD AND CITIZENS IN SUPPORT OF ATTLEBORO MALL,
Petitioners,

v.

UNITED STATES ENVIRONMENTAL PROTECTION AGENCY, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MOTION OF THE LOUISIANA LANDOWNERS ASSOCIATION, INC. FOR LEAVE TO FILE THE ATTACHED BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONERS' APPLICATION FOR WRIT OF CERTIORARI

Newman Trowbridge, Jr.
Darnall, Biggs,
Trowbridge, Supple & Cremaldi
Lawless Building
P. O. Drawer 565
Franklin, Louisiana 70538-0565
Telephone: (318) 828-5480

Joseph E. LeBlanc, Jr.
Counsel of Record
Nesser, King & LeBlanc
Suite 3800
201 St. Charles Ave.
New Orleans, Louisiana 70170
Telephone: (504) 582-3800

Counsel for Amicus Curiae, Louisiana Landowners Association, Inc.

A B Letter Service, Inc., 327 Chartres St., New Orleans, La. (504) 581-5555

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The Louisiana Landowners Association, Inc. ("LLA") respectfully moves the Court for leave to file the attached brief *amicus curiae* in support of the petition of John A. Bersani, Newport Galleria Group, Robert J. Congel and the Pyramid Companies and the petition of Joseph Robichaud and Citizens in Support of Attleboro Mall for writs of certiorari to the United States Court of Appeals for the Second Circuit. The LLA has received consent to the filing of this

brief from petitioners, from the respondent United States, and from intervenor - appellants below, Joseph Robichaud and Citizens in Support of Attleboro Mall. Intervenor - appellees below, the environmental groups listed in the certificate of service filed by the clerk, have declined to grant consent. This brief is timely filed within the extension of time granted to respondents until January 27, 1989 in which to file their opposition to the petitions for certiorari.

The LLA is an association composed of approximately 500 landowners in the State of Louisiana. It is the principal landowners association in the State which has been organized for the purpose of representing and protecting the interests and property rights of its members.

The involvement of LLA members in the permit process under Sec. 404 of the Clean Water Act ("CWA"), 33 U.S.C. 1344, is extensive. The wetland basins of Louisiana comprise about 25% of the total wetlands of the United States. See Randall A. Fish, "The Coastal Wetlands Environmental Levy: An Analysis Under the Commerce and Supremacy Clauses," 29 *Loy. L. Rev.* 153, 154 (1982); and Ralph W. Tiner, Jr., 'Wetlands of the United States: Current Status and Recent Trends," National Wetlands Inventory, Department of the Interior, U. S. Fish and Wildlife Service (March 1984), p. 28, fig. 25. LLA members hold title to thousands of acres of land which have been - or may be - classified as "wetlands", either because the land is affected by tidal waters or because the land might arguably be considered "wetland" by either the U. S. Army Corps of Engineers ("COE") or the U. S. Environmental Protection Agency ("EPA") in the administration of the 404 permit program. The need to obtain a permit for uses of wetland property involving the discharge of dredged or fill material directly involves LLA members in this permit process. The LLA is vitally concerned that the 404 program be ad-

ministered in a sound and fair manner consistent with the balance between conservation and development intended by Congress in its passage of the CWA.

The Final Determination under review in this case represents a dramatic departure from the authority granted EPA in Sec. 404(c) of the CWA. EPA's "veto" of the permit which COE proposed to issue for construction of a shopping mall at Sweedens Swamp was based upon a flawed application of Sec. 404(c) and the guidelines developed by EPA, in conjunction with the COE, under Sec. 404(b)(1) of the CWA. Petitioners' request for a writ of certiorari should be granted to restore much-needed direction to a permit program that affects not only members of the LLA, but major planning and development interests on which the future growth of this country depends. In the attached *amicus curiae* brief, the LLA addresses the quandary and confusion now facing its members as a result of the ruling below; the need for EPA to have used rulemaking to announce its new "market entry" theory for determining the availability of "practical alternatives"; and EPA's failure to respect the limitations of Sec. 404(c) and its own regulations in making the crucial determination of "unacceptability" required by the statute. EPA's departure from the authorized scope of the 404 program is so widespread that it desperately calls for correction by this Court.

For the above reasons, the LLA respectfully submits that the Court should grant this Motion for leave to file the attached amicus curiae brief.

Respectfully submitted,

Joseph E. LeBlanc, Jr.
Counsel of Record
Nesser, King & LeBlanc,
201 St. Charles Avenue
Suite 3800
New Orleans, La. 70170
Telephone: (504) 582-3800

Newman Trowbridge, Jr.
Darnall, Biggs, Trowbridge,
Supple & Cremaldi
Lawless Building
P. O. Drawer 565
Franklin, La. 70538-0565
Telephone: (318) 828-5480

Attorneys for Amicus Curiae,
Louisiana Landowners
Association, Inc.

January 18, 1989

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BRIEF AMICUS CURIAE ON BEHALF OF THE LOUISIANA LANDOWNERS ASSOCIATION, INC. IN SUPPORT OF PETITIONERS' APPLICATION FOR WRIT OF CERTIORARI

I.

INTEREST OF AMICUS CURIAE

The interest of *amicus curiae* is set forth in the preceding motion for leave to file this brief.

II.

STATEMENT OF THE CASE

The Louisiana Landowners Association, Inc. ("LLA") adopts the Statement of the Case in the petition filed by petitioners Bersani, *et al.*

III.

ARGUMENT

This case raises fundamental issues relating to the exercise of EPA's "veto" authority under Sec. 404(c) of the Clean Water Act ("CWA"), 33 U.S.C. 1344(c). In the Final Determination under review in this case, EPA went far beyond the limits of the statute, and action by this Court is necessary to stop the agency error before it goes further.

A. The Petition for Certiorari Should be Granted Because EPA's Market Entry Theory Provides No Guidance to Affected Landowners and is Impossible to Apply.

The petition for certiorari of Bersani, *et al,* and the brief *amici curiae* submitted by the National Homebuilders Association, *et al,* point out in telling detail the absence of standards inherent in the market entry theory announced by EPA in this case, the lack of guidance which it provides to the regulated community, its conflict with planning and development processes in the real world, and its general unsuitability as a regulatory tool. In this amicus submission, the LLA shows that these uncertainties are compounded for landowners, large and small, who hold property with the thought and hope of future development. In the Final Determination, EPA concedes that it has no answers as to how its new market entry theory would apply to such landowners:

> The issue addressed here relates particularly to circumstances where a developer or developers are entering a market area for the accomplishment of a specific project. I need not, and do not decide here what the relevant time period would be in other circumstances - e.g., where an applicant wishes to build on property inherited or acquired long ago.

Petition of Bersani, *et al* for Writ of Certiorari, Appendix D, p. 93a, note 14.

This leaves the matter in hopeless confusion and presents a threatening "unknown" for owners of wetland properties who may envision a future use of their land. No guidance is given the landowner as to how the market entry theory may be applied to him, despite the fact that the Second Circuit Court of Appeals has declared that the market entry theory is the *only* reasonable interpretation of the regulations. *Bersani v. Robichaud*, 850 F.2d 36, 44 (2d Cir. 1988). The result is that landowners must wonder and guess at what will be required of them and face the risk of finding out only through a decision by EPA that they have not done enough. This is the dilemma that faced petitioners, who learned of the market entry theory only through EPA's decision that they had not satisfied it. This is fundamentally wrong and unfair. "[I]t is too late for an Agency to declare the standards to be met by its decision holding that they have not been met. . . ". *Hill v Federal Power Commission*, 335 F.2d 355, 356 (5th Cir. 1964). See, Also, *Satellite Broadcasting Co., Inc. v. FCC*, 824 F.2d 1, 3 (D.C. Cir. 1987).

Certiorari should be granted to prevent EPA from using such an elusive and undiscernible standard against landowners and others in the regulated community.

B. The Petition for Certiorari Should be Granted Because EPA's New Market Entry Theory Has the Effect of a Rule But Was Announced Without Adherence to Rulemaking Proceedings.

The effect of the market entry theory announced for the first time in this case will be widespread. This is evident from the numerous petitions for leave to submit briefs *amici curiae* in support of the Bersani, *et al* petition for certiorari. The impact of EPA's Final Determination will be felt by planners, developers, port authorities, landowners, local and state governments and all other persons contemplating activities in wetlands. Such impact has been virtually assured by the Second Circuit's holding that the market entry theory is the *only* reasonable interpretation of the regulation to determine the availability of "practicable alternatives".

When agency action is of such general applicability and will have such substantive impact upon an entire regulated community who must thereafter comply, the agency is required to follow the notice and comment procedures for rulemaking specified in the Administrative Procedures Act, 5 U.S.C. 552, 553. This is especially true when the agency announces a new standard that departs from past construction of the regulation. *Knutzen v. Eben Ezer Lutheran Housing Center,* 815 F.2d 1343, 1351 (10th Cir. 1987); *NI Industries, Inc. v. U.S.,* 841 F.2d 1104, 1107 (Fed. Cir. 1988); *United States Department of Labor v. Kast Metals Corp.,* 744 F.2d 1145, 1149, (5th Cir. 1984); and *Appalachian Power Co. v. Train,* 566 F.2d 451, 455 (4th Cir. 1977).

Although EPA has some flexibility in determining whether to proceed by rulemaking or adjudication, when the results of its action amount to a "substantive rule", the

notice and comment procedures of the APA must be followed. *Morton v. Ruiz,* 415 U.S. 199, 231 - 233, 94 S.Ct. 1055, 1072 - 1073 (1974); and *N.L.R.B. v. Wyman-Gordon Co.,* 394 U.S. 759, 764 - 766, 89 S.Ct. 1426, 1429 (1969). Rulemaking in this case would have allowed affected persons to raise the myriad of questions about the market entry theory that have arisen and would have forced EPA to develop sound responses to these concerns or abandon the theory as impractical and unworkable. In either case, the regulatory process would have benefited and the regulatory community would know in advance the standards with which it must comply.

It is necessary that certiorari issue in this case to require EPA to follow the rulemaking procedures specified in the APA before adopting or attempting to apply the market entry theory.

C. The Petition for Certiorari Should be Granted Because EPA's "Unacceptability" Determination Failed to Make the Findings Required by Sec. 404(c).

EPA's Sec. 404(c) authority is limited. It can be exercised only upon a determination by EPA that a proposed discharge will have an "unacceptable adverse effect" on municipal water supplies, shellfish beds and fisheries (including spawning and breeding areas), wildlife or recreational areas. The key determination is one of "unacceptability".

This requires, first, a finding of adverse effects upon the environmental values listed in the statute and, secondly, a further determination of whether the impacts are "unacceptable". This involves a weighing and balancing of the impacts in light of such factors as the project purpose and need, the availability of practicable alternatives, the

significance of the environmental values at issue, the effectiveness of mitigation measure, and the "takings" implications of the agency action.*

In its 404(c) regulations, EPA has defined "unacceptable adverse effect" as involving only "*significant* degradation of municipal water supplies (including surface or groundwater) or *significant* loss of or damage to fisheries, shellfishing or wildlife habitat or recreation areas." (emphasis added). 40 C.F.R. 231.2(e). Sec. 404(c) is not concerned with "insignificant" effects. Section 404(c) is also not concerned with protecting *all* wetland areas. The 404(b)(1) guidelines recognize that waters of the United States "vary greatly" (44 *Fed. Reg.* 54222, September 18, 1979, and 45 *Fed. Reg.* 85336, December 24, 1980), and it is only "important" wetlands that are intended for 404 protection. See 33 C.F.R. 320.4(b) and *United States v. Riverside Bayview Homes, Inc.,* 106 S.Ct. 455, 463 n. 9 (1985). Section 404(c) is even more limited. It is to be used only when necessary to protect "critical areas." Legislative History of the Federal Water Pollution Control Act of 1972, Vol. 1 at 236 and 816 (Comm. Print 1973). If a wetland is not of "critical importance" to the aquatic ecosystem, it is not a fit subject of Sec. 404(c).

To sustain a veto under Sec. 404(c), EPA must have before it wetlands of critical importance to the aquatic environment whose destruction will result in significant and unacceptable adverse effects upon one of the values listed in the statute. Such findings are missing from the Final

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* On March 15, 1988, President Ronald Reagan affirmed the need for federal agencies to consider the "takings" implications of their actions - especially in light of the recent decisions of this Court in *Nollan v. California Coastal Commission,* 107 S.Ct. 3141 (1987) and *First English Evangelical Lutheran Church v. Los Angeles County,* 107 S.Ct. 2378 (1987) - in his signing of Executive Order 12630.

Determination. There is nothing to indicate that Sweedens Swamp is a "critical area", nor is there any question of adverse impacts upon municipal water supplies, shellfish beds or fisheries (including spawning and breeding areas), or recreational areas. There are only passing references to significant habitat values which are in stark contrast to EPA's characterization of Sweedens Swamp as an "ordinary swamp" (Bersani, *et al*, Petition, Appendix D. p. 67a) which ". . .is neither a unique wetland nor habitat for endangered species." (*Id.* at 76a).

The crux of EPA's veto was that "practicable alternatives" were available to petitioners even if there was no significant degradation. (*Id.* at 67a-68a.) Under Sec. 404(c), however, this is not enough. A finding of "significance" and "unacceptable degradation" is the touchstone of the statute. Moreover, EPA's "practicable alternatives" analysis was itself skewed, based as it was upon an arbitrary and standardless "market entry" theory. The analysis was further flawed by EPA's impermissible shifting of the burden of proof to petitioners to prove that practicable alternatives were not available. This was done when EPA applied 40 C.F.R. 230.10(a)(3) of the 404(b)(1) guidelines, which presumes that less damaging practicable alternatives are available for non water-dependent activities, to the 404(c) determination. EPA itself has recognized, in the Preamble to the 404(b)(1) guidelines, that ". . .[i]f the Administrator uses his 404(c) 'veto', then he does have the burden to justify his action, but that burden does not come into play until he begins a 404(c) proceeding (See, 40 C.F.R Part 231)." (45 *Fed. Reg.* 85338, December 24, 1980).

In the Final Determination, EPA also disregarded the good faith project investment made by petitioners on the basis of COE's past construction of the practicable

alternatives requirement, COE's finding of compliance with the 404(b)(1) guidelines, the project approval given by the State of Massachusetts, and COE's judgment as to the sufficiency of the mitigation measures agreed to by petitioners. EPA further exceeded its authority in considering the cumulative loss of wetlands in other areas of the State when it found that Sweedens Swamp was "an isolated or 'island' wildlife habitat." (*Id.* at 74a). Wetland losses in other areas can not be considered without an ecological connection to the swamp and can not make up for a lack of significant unacceptable effects upon the swamp site itself.

If allowed to stand, the Final Determination would allow EPA to establish a virtual "standing veto" whenever there are *any* adverse effects on the most ordinary of wetlands. This is not the standard of Sec. 404(c). It disregards the limitations of the statute, the provisions of the regulations, and the serious and impartial weighing and balancing of factors inherent in the determinations of "unacceptability" and "significance".

Certiorari should be granted to set aside EPA's disregard of the limitations upon its authority under Sec. 404(c).

CONCLUSION

For the reasons stated above, the LLA submits that the Court should issue a writ of certiorari to review the judgment and opinion of the Second Circuit Court of Appeals.

Joseph E. LeBlanc, Jr.
Counsel of Record
Nesser, King & LeBlanc
201 St. Charles Avenue
Suite 3800
New Orleans, Louisiana 70170
Telephone: (504) 582-3800

Newman Trowbridge, Jr.
Darnall, Biggs,
Trowbridge, Supple & Cremaldi
Lawless Building
P. O. Drawer 565
Franklin, Louisiana 70538-0565
Telephone: (318) 828-5480

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CERTIFICATE OF SERVICE

The undersigned member of the Bar of this Court hereby certifies that the foregoing motion for leave to file amicus brief, and attached amicus brief, has been served upon all parties required to be served by depositing copies of the motion and brief in the United States mail, with first-class postage prepaid, addressed to the following counsel of record:

Gary H. Baise
Beveridge & Diamond, P.C.
1333 New Hampshire Avenue, N.W.
Washington, D.C. 20036
Counsel for Petitioners,
Bersani, *et al.*

Paul D. Kamenar
Washington Legal Foundation
1705 N. Street, N.W.
Washington, D.C. 20036
Counsel of record for
Petitioners, Robichaud, *et al.*

Charles Fried
Solicitor General
U.S. Department of Justice
Washington, D.C. 20530
Counsel for U.S. Environmental
Protection Agency, *et al.*
Respondents

Robert Dreher
Sierra Club Legal Defense Fund
1531 P. Street, N.W.
Suite 200
Washington, D.C. 20005
Counsel for Intervenor-Appellee
Environmental Groups,
Respondents

Joseph E. LeBlanc, Jr.
Counsel for the Louisiana,
Landowners Association, Inc.,
Amicus Curiae